IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No.....

WILLAPOINT OYSTERS, INC., *Petitioner,*

v.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

August 15, 1949

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

Permission is hereby requested that the undersigned Attorney General of the State of Washington be allowed to file a brief as amicus curiae on behalf of the state pursuant to Rule 27 (9) of the Rules of the Supreme Court of the United States.

SMITH TROY,
Attorney General,
State of Washington,

LYLE L. IVERSEN,
Assistant Attorney General,
State of Washington,

Attorneys for State of Washington.

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

The State of Washington has requested permission to appear as *amicus curiae* in this case because the orders made by the Food and Drug Administrator in this case will seriously and adversely affect an important industry of this state. These orders are unreasonable and discriminate against a product of this state in that the product is rendered relatively unmarketable and elements which have made it attractive to buyers are destroyed. The orders are unlawful, in violation of the Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat.

1040 [21 U.S.C.A. (Supp.) 301, et seq.], and of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237 [5 U.S.C.A. (Supp.) 1001, et seq.].

The State of Washington adopts the Petition for Writ of Certiorari and Supporting Brief of Petitioner in this case.

STATEMENT OF THE CASE

The canning of oysters in the State of Washington was begun over thirty years ago. (R. Vol. III, 154.) The oysters canned in this state are of a species known as *ostrea gigas* or giant oysters. They were transplanted from the Japanese Coast and acclimated to the waters of the Pacific Coast. The industry extends from Southeastern Alaska into the states of Washington, Oregon and California. (R. Vol. III, 159.)

While not of record in this case, public records of the Land Commissioner of the State of Washington show that the state owns over 10,000 acres of oyster lands now in production, and more than 90,000 acres of suitable and potential oyster lands.

The oyster industry is large and growing in this state. Revenues of the state from this source over a 44 year period, 1901 to 1945, amounted to $187,688, or an average of approximately $4400 per year, but during the past four years, through 1948, the state's revenues from oyster collections aggregated $290,770, or an average in excess of $72,000 per year.

Commencing in 1949, the state will also earn substantial tax revenues from the oyster industry.

It will be seen from the foregoing that the welfare of the oyster industry is of considerable importance to the State of Washington. Appendix A attached hereto, official data compiled from the Pacific Fisherman, shows the impressive growth of the industry. The business of propagating seed oysters within the area has likewise grown substantially. (R. Vol. III, 159-60.)

The demand for these oysters has increased by leaps and bounds. (R. Vol. III, 161.) These large oysters mature in about three years. Canned to a net cut-out weight of five ounces, there is a ready customer demand for them. This has been the standard pack in the oyster industry of this area and it is now a basic factor in the economic phase of the oyster industry on the Pacific Coast. (R. Vol. III, 157.)

West Coast oysters differ sharply from Southern oysters both as to zoological species and processing. (R. Vol. III, 161.) Western oysters have nutritional value recognized by medical science as favorable to persons suffering from anemia or in run down physical condition. According to the testimony of the Chairman of the Department of Zoology of the University of Washington these Western oysters stand next to liver as the best food material available for the cure of anemia and even pernicious anemia. (R. Vol. III, 166.)

Qualified food experts testify to the high food value content of the Western oyster when processed and canned by light steaming or blanching so as to retain the lymph fluid, iron and copper, and glycogen, which are of high nutritive value. (R. Vol. III, 165, 166-168.) Excessive heating would deteriorate the oyster from the standpoint of quality and cause excessive shrinkage. (R. Vol. III, 170-1.) The very elements which have created the customer demand for the oysters produced in this area and have made them a superior product, will be to a large measure destroyed by steaming necessary to pack them in the manner required by the orders.

Witnesses for the Food and Drug Administration seem to disregard the comparative food values of Western

oysters and to be concerned only with drained weight content rather than food content in attempting to gain a parity with Southern oysters through requiring an equality of weight. Apparently no regard was had to the fact that such a pack would require excessive steaming seriously detrimental to the healthful characteristics, satisfying taste, and pleasing appearance and shape, which have made canned Western oysters the superior product that they are.

ARGUMENT

The State of Washington has not appeared as a party to these proceedings. Its interest, however, in this case is considerable, both from the standpoint of protecting the interests of its citizens engaged in an important industry and from its own standpoint as the owner of large tracts of producing or potential oyster lands, and as the recipient of tax revenues from this industry. Briefs of both petitioner and respondent before the Court of Appeals, the opinion of the Court of Appeals, and the Petition for Certiorari and Supporting Brief filed by petitioner have been studied by the undersigned attorneys, and they concur in the contentions of petitioner that unfair procedural methods adopted by the respondents resulted in the unlawful orders complained of, and that those procedural methods were violative of the decisions of this Court in the first Morgan case, *Morgan v. United States,* 298 U. S. 468, 80 L. Ed. 1288 (1936), and the second Morgan case, *Morgan v. United States,* 304 U. S. 1, 82 L. ed. 1129 (1938), and that the portion of the two final orders which fixed an identical standard of fill was not in accordance with law because: (a) it was made without observance of procedure required by law; (b) it was not supported by substantial and lawful evidence; (c) it was unreasonable and in excess of statutory jurisdiction; (d) it was arbitrary, capricious and an abuse of discretion; (e) it was contrary to constitutional rights.

CONCLUSION

Certiorari should be granted to review the final opinion and decree of the Court of Appeals, and, on review, the two final orders fixing identical standards of fill should be permanently enjoined because made in a manner that was not in accordance with law, and the matter should be remanded to the Administrator for further proceedings.

Respectfully submitted,

SMITH TROY,
Attorney General,
State of Washington,

LYLE L. IVERSEN,
Assistant Attorney General,
State of Washington,

Attorneys for State of Washington.

APPENDIX A

The PACIFIC FISHERMAN, 1949 Yearbook Number, January 25, 1949 (Miller Freeman Publications), pp. 285, 287, shows the growth and importance of the Canned Oyster industry to the Pacific Coast in the two following tables:

PACIFIC CANNED OYSTERS
Season of 1947-48

Company	Cannery Location	Cases No. 1, E. O. (4 Doz.)	Cases Other Sizes	Total Standard Cases 48, No. 1, E. O.
Bendiksen, E. H.	South Bend, Wash.	28,661	.....	28,661
Davis Co., W. E.	Aberdeen	1,500	.....	1,500
Northern Oyster Co.	Oysterville	1,050	100	1,210
Wiegardt Bros.	Ocean Park	15,658	709	16,888
Willapoint Oysters, Inc.	South Bend	54,000	.....	54,000
Total 1947-48 Season.	.....	100,869	809	102,259

Pacific Canned Oysters Packed in—

1947	57,316	1942	72,315	1936	118,853
1946	89,050	1941	178,445	1935	88,062
1945	3,184	1940	148,870	1934	68,325
1944	none	1939	112,540	1933	32,315
1943	583	1938	111,348	1932	12,233
		1937	130,872	1931	7,900

NOTE:—Packs of smoked oysters are not included in the totals in the column showing packs in standard cases. This total column is concerned only with steam-canned oysters.

Figures prior to 1948 are from the U. S. Fish and Wildlife Service, compiled on a calendar year basis.

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CHARLES ELMORE

In the

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OCTOBER TERM, 1949

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Petitioner,

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OSCAR R. EWING, Administrator, and
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FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION,
Respondents.

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF THE RECORD IN APPLYING FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

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Of Counsel.

Dated at Seattle, Washington, June 30, 1949.

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No. .....

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF THE RECORD IN APPLYING FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Asociate Justices of the Supreme Court of the United States:

Comes now your Petitioner, Willapoint Oysters, Inc., and moves this Honorable Court for leave to dispense with printing of the record and in lieu thereof to proceed on clearly legible copies of the duplicate original typed record in form as requested by Praecipe to be transmitted to the Clerk of this Honorable Court by the Clerk of the Court of Appeals for the Ninth Circuit, and in support thereof respectfully shows:

1. Petitioner, Willapoint Oysters, Inc., has served and filed its Praecipe for Transcript of the Record

herein, requesting the Clerk of the Court of Appeals for the Ninth Circuit to certify for filing with the Clerk of this Court the duplicate original and three copies of the typewritten (duplicator, mimeographed and typed) record on which this matter was heard and determined therein, for use on Petition for Writ of Certiorari now being prepared, and to be printed, served and filed seasonally within the next 30 days, on or before August 2, 1949.

2. Petitioner commenced this proceeding by filing in the Court of Appeals for the Ninth Circuit a petition for judicial review and for further relief under §701(f) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 1055-6; 21 USCA §371, to review two certain final orders of the Administrator, and of the Acting Administrator, Federal Security Agency, Food and Drug Administration.

3. Pursuant to §701(f) (1) of that Act, after said petition was filed and served, the respondent Administrator certified and filed in the Court of Appeals a duplicate original of the transcript of the proceedings and record on which his first final order was based. The transcript which he certified to the Court of Appeals was a true copy made on an original "spirit duplicator" or "ditto" machine.

4. In order to conserve both time and expense (then estimated at approximately ONE THOUSAND FIVE HUNDRED ($1500.00) DOLLARS), Petitioner moved in the Court of Appeals for an order permitting it to proceed upon additional duplicate originals of said transcript which it agreed to purchase and furnish

promptly. Petitioner showed that such transcripts in form as certified by the Administrator were clear and legible, and offered to furnish additional duplicates of the transcript of testimony, and (by positive photostatic process, restoring the normal condition of clear black print on white paper) to purchase and furnish like additional copies of the voluminous original exhibits, many of which are of a detailed statistical nature and expensive and time-consuming to print. Counsel for respondents assented to said motion. Petitioner invoked the Court's discretion to grant its motion under the *Federal Rules of Civil Procedure*, 28 USCA, foll. §723c, Rule 75, *Notes of Advisory Committee of Rules*, Note to Sub-division (1), p. 760 at 761.

5. The Court of Appeals, by its order dated June 7, 1949, granted Petitioner's motion, as follows:

> "IT IS ORDERED that said motion be, and hereby is granted, and that petitioner be, and it is hereby granted leave to present the petition for review on a typewritten transcript of record; *four clear legible copies* of the transcript as designated by counsel for (the) respective parties under Rule 19, to be filed with the clerk of this court within forty days after the Administrator, Federal Security Agency, has disposed of this cause on its remand for the hearing of additional evidence; one copy of such transcript to be served upon counsel for respondent; the transcripts to be typed on letter size paper 8 x 10½", or reporter's transcript paper, and *bound on the left margin as a book.*"[1]

---

[1]Emphasis supplied herein, unless otherwise noted.

6. As indicated in said order of June 7, 1949, the Court of Appeals, after oral argument on motion for temporary injunction, and responsive to an alternate prayer of petitioner, also issued a separate order of even date, which remanded the controversy to respondent Administrator to take additional evidence prior to full judicial review by said Court on the merits.

7. Thereafter, on remand, the respondent *Acting* Administrator took additional evidence and he issued a "second final order," which he likewise certified and filed in the Court of Appeals together with duplicate original or "ditto" transcript of said further proceedings and record on which his second final order was based.

8. Petitioner promptly complied with permission granted by the Court's order of June 7, 1949, and prepared, served and filed four clearly legible duplicate-original copies of the original and supplemental transcripts of proceedings, exhibits and record before the Administrator and the Acting Administrator, respectively; each bound on the left margin as a book. Similarly, four copies of all pertinent pleadings were served and filed in the Court of Appeals. Each is clearly legible and well-typed or mimeographed, and each is similarly stapled on the left margin as a book.

9. Prior to final argument, briefs were filed in printed form, pursuant to the Rules, and will be similarly so prepared on the Petition for Writ of Certiorari and subsequent proceedings.

10. On April 29, 1949, the Court of Appeals entered

its final opinion and decree, and on June 3, 1949, said Court denied a Petition for Rehearing. The Decree set aside in part and enforced in part, in accordance with the opinion, the Administrator's and Acting Administrator's orders.

11. It will be necessary for this Court to consider portions of so much of the entire record as Petitioner has designated in its Praecipe in determining whether to grant Petitioner's prayer for a Writ of Certiorari, and thereafter in reviewing the opinion and decree of the Court of Appeals.

12. The Clerk of the Court of Appeals now estimates that if printing were required at this stage of the proceedings, such printing would cost approximately FIVE THOUSAND THREE HUNDRED ($5,300.00) DOLLARS. The transcript comprises 1178 pages of record and more than 200 pages of exhibits, plus the pleadings.

13. Petitioner concurs with respondents in the desire for an early settlement of this controversy. It believes its petition for a Writ of Certiorari is well founded. The decision of the Court of Appeals was partially favorable to it and partially adverse. Determination on the present record will expedite a decision. In a very recent and not dissimilar situation in *Matter of Electric Power & Light Corporation*, ... U.S. ....., 69 S.Ct. 917 (adv. sh.) decided May 16, 1949, the separate opinion of Mr. Justice Frankfurter noted that appeal below was expedited by setting for argument on the merits on a "typewritten record and briefs."

14. In order to avoid any possible intervening delay, this motion for leave to dispense with printing of the record is being submitted by petitioner prior to its Petition for Writ of Certiorari, and well within the 60-day stay period which the Court of Appeals has allowed Petitioner to submit its petition for Writ of Certiorari. Counsel for petitioner is meanwhile completing said petition for Writ of Certiorari and plans to print, serve and file 40 printed copies thereof in conformance with this Court's rules.

15. While printing of the record at this stage would entail very great further expense to Petitioner and some further delay, nevertheless, if this Court should so direct as a condition precedent to its consideration of Petitioner's printed petition for Writ of Certiorari, shortly to be filed, Petitioner will, notwithstanding said heavy burden, promptly undertake such printing.

16. But if this Court should grant the instant motion to dispense with printing, and thereafter in granting certiorari should provide that prior to argument, the record or portions directed by it be printed for the Court's convenience, Petitioner likewise will undertake promptly to print such portions as this Court may direct.

WHEREFORE, Petitioner moves this Honorable Court for an order to dispense with printing of the record in considering its Petition for a Writ of Certiorari, and, if granted, in reviewing said opinion and decree of the Court of Appeals; and that this Honorable Court consider the same upon the duplicate originals of the record, and the three additional copies thereof, in bound volumes, paged consecutively, and appropri-

ately indexed, which the Clerk of the Court of Appeals has been requested by Praecipe to prepare at petitioner's expense and to be transmitted to the Clerk of the United States Supreme Court.

Dated at Seattle, Washington, June 30, 1949.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner, Willapoint Oysters, Inc.

GROSSCUP, AMBLER & STEPHAN,
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Of Counsel.

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CHARLES ELMORE

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Dated at Seattle, Washington, March 30, 1950.

THE ARGUS PRESS, SEATTLE

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now your Petitioner, Willapoint Oysters, Inc., and moves this Honorable Court for leave to file a Petition for Rehearing of its Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit, and in support thereof respectfully shows:

1. On August 19, 1949, Petitioner filed its Petition for Writ of Certiorari and Supporting Brief. Respondents filed a Brief in Opposition on October 4, 1949. Petitioner filed its Reply on October 14, 1949. Petitioner had previously also filed a Motion to Dispense with Printing of Record.

2. On October 24, 1949, this Honorable Court entered its order as follows:

> "The motion to dispense with printing the record is granted. The petition for writ of certiorari is denied. Mr. Justice Douglas took no part in the consideration or decision of these applications."

3. On February 20, 1950, this Honorable Court delivered its opinion and judgment in No. 154, *Wong Yang Sung v. J. Howard McGrath, Attorney General of the United States and Watson V. Miller, United States Commissioner of Immigration and Naturalization.* Said opinion by Mr. Justice Jackson was 6 to 1, Mr. Justice Reed, dissenting; and Mr. Justices Douglas and Clark not participating. 70 S. Ct. 445.

4. Said opinion in *Wong Yang Sung v. McGrath* goes to the heart of the problem of administrative fairness and procedural due process, and holds that on the facts there in issue it was unlawful to embody:

> "in one person or agency the duties of prosecutor and judge." (70 S. Ct. 450)

5. While the facts necessarily differ, it is believed that the principle so clearly enunciated in *Wong Yang Sung v. McGrath* is highly relevant and controlling of the issues raised by petitioner's original Petition for Certiorari. For this reason leave to file its Petition for Rehearing and Supporting Brief is now respectfully requested.

6. The lower court opinions in this case, now reversed by the Supreme Court, did not disclose the parallels in these two cases. 80 F.S. 235, 174 F.2d 158. Therefore the *Wong Yang Sung* case in the lower courts and its pendency here on certiorari were not referred to in the original Petition for Certiorari; nor could a well founded Petition for Rehearing be filed until after this Court's decision in that case on February 20, 1950.

7. Petitioner was originally granted injunctive relief against the allegedly unlawful orders of the Food and Drug Administration on the basis of irreparable damage. This was heretofore granted by the Court of Appeals for the Ninth Circuit, and extended until it was dissolved as

a result of this Honorable Court's original denial of the Petition for Certiorari.

8. Petitioner has previously shown that compliance requires it to impair the quality of pack of its food product. If this Court should grant certiorari, petitioner prays that such injunctive relief be restored pending this Court's final opinion.

9. If this request to restore injunctive relief should be denied, but certiorari granted, petitioner then prays such relief be restored if and when petitioner prevails in a final opinion of this Court.

10. Petitioner's counsel certifies that the Petition for Rehearing is filed in good faith and not for delay.

WHEREFORE Petitioner moves this Honorable Court for leave to file its Petition for Rehearing of its Petition for Certiorari.

Dated at Seattle, Washington, March 30, 1950.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner,
Willapoint Oysters, Inc.

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Seattle 4, Washington,
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